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Protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 62/159 and Human Rights Council resolution 6/28.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

Following the introduction, section II of the present report highlights two key activities of the Special Rapporteur, including a visit in December 2007 to Guantánamo Bay for the purposes of observing military commission hearings and a summary of an official country visit to Spain in May 2008. The main thematic focus of this report is the fundamental right to a fair trial in the specific context of prosecuting terrorist suspects.

Section III of the report provides an overview of the applicable legal framework as reflected in international human rights treaties, treaty and customary international law, and conventions to counter terrorism. Of particular relevance is Human Rights Committee, general comment No. 32 on article 14 of the International Covenant on Civil and Political Rights. The Special Rapporteur also emphasizes that fundamental principles of the right to a fair trial may not be subject to derogation and that any derogation must not circumvent the protection of non-derogable rights.

In section IV of the report, the Special Rapporteur analyses the key role of the judiciary both as a vehicle of legal recourse to ensure that terrorist suspects who are detained pursuant to criminal law provisions or subject to "administrative detention" or detained during the course of participating in hostilities have effective access to the courts. The Special Rapporteur reflects on the key elements of independence and impartiality that are required of a judicial institution in order that justice can be administered in a competent, fair and open manner. In this context, the jurisdiction of military or special courts is discussed. The Special Rapporteur also addresses a key area of concern regarding the broader issue of access to justice regarding the practice of listing and de-listing individuals and groups as terrorist or associated entities by intergovernmental bodies or by a national procedures of a State.

Various aspects of a fair hearing are outlined in section V of the report, which include: the privilege against self-incrimination; evidence obtained in breach of human rights or domestic law will render the trial unfair; the right to equal treatment and equality of arms; the right to disclosure of information and the right to representation; and applicable standards of proof.

Section VI of the report makes a reference to death penalty cases and reflects the concerns of the Special Rapporteur when a trial involving terrorism offences could lead to the imposition of capital punishment. All stages of the proceedings and the consideration of appeals on matters of fact and law must comply with all aspects of a fair trial.

In the concluding section, the Special Rapporteur emphasises a number of basic principles as elements of best practice in securing the right to a fair trial in terrorism cases.

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I. Introduction

1. The present report is the fourth submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolution 6/28 and Assembly resolution 62/159. It highlights activities from 1 November 2007 to 31 July 2008, including the visit of the Special Rapporteur to Guantánamo Bay in December 2007 for the purposes of observing the military commission hearings and an official visit to Spain in May 2008. The main thematic focus of this report is the right to a fair trial in the fight against terrorism.

2. In addition to his last report to the General Assembly,[1] the Special Rapporteur draws attention to his main report[2] and addenda[3] considered at the sixth session of the Human Rights Council in December 2007. The main report summarized the activities of the Special Rapporteur in 2007 and focused on the thematic issue of the effects of counter-terrorism measures in relation to economic, social and cultural rights. The addenda contained a communications report and reports on official missions to South Africa, the United States of America and Israel, including a visit to the Occupied Palestinian Territory.

3. Regarding future country visits, the Special Rapporteur accepted with appreciation the official invitation extended by the Government of Tunisia on 5 June 2008. At the time of submission of the present report, the dates of the mission had not been confirmed.

II. Activities related to the Special Rapporteur

4. General activities undertaken by the Special Rapporteur will be reflected in a forthcoming report to the Human Rights Council, however, two key activities are reflected below.

Country visits and follow-up visits

5. From 3 to 7 December 2007, as a follow-up to the official visit to the United States of America in May 2007, the Special Rapporteur visited Guantánamo Bay for the purpose of observing hearings under the 2006 Military Commissions Act. The visit supported concerns previously reflected in the report of the Special Rapporteur[4] regarding the incompatibility of the Military Commissions Act with relevant international standards. The hearing illustrated numerous challenges faced by the military judge to ensure fair trial principles.

6. From 7 to 14 May 2008 the Special Rapporteur conducted an official visit to Spain. The mission report will be submitted to a future session of the Human Rights Council. The preliminary findings of the Special Rapporteur were reflected in a

[1] A/62/263.
[2] A/HRC/6/17.
[3] A/HRC/6/17/Add.1-4.
[4] A/HRC/6/17/Add.3.

press statement[5] issued during a press conference held on 14 May, where he acknowledged the tragic incidents of domestic and international terrorism in Spain, highlighted the international role of Spain in countering terrorism while respecting human rights and identified elements of best practice regarding the use of the criminal justice system to combat terrorism. The Special Rapporteur examined a number of key issues including concerns regarding the definition of terrorist crimes in Spanish statutory law and judicial practice and the practice of incommunicado detention. He highlighted positive aspects regarding the trial of the 11 March 2004 bombings but did note concerns regarding the pretrial phase and the right to review by a higher court. He acknowledged the Government's efforts to address issues concerning victims of terrorism by legislative and administrative measures.

III. Right to a fair trial in the fight against terrorism

7. The right to a fair trial is one of the fundamental guarantees of human rights and the rule of law. It comprises various interrelated attributes and is often linked to the enjoyment of other rights, such as the right to life. The Human Rights Committee adopted in 2007 general comment No. 32, which stands as a substantial commentary of the right to a fair trial under article 14 of the International Covenant on Civil and Political Rights and reflects upon a considerable body of jurisprudence.[6] In the course of his mandate, the Special Rapporteur has noted several times with concern that in the fight against terrorism fair trial rights have not always been respected. This report reflects therefore upon various aspects of article 14, of the Covenant as well as the case law, legislation and practice of a number of Member States in order to identify a set of best practices in respect of the right to fair trial in the context of counter-terrorism.[7]

A. The framework of applicable law

8. Article 14 (1) of the International Covenant on Civil and Political Rights guarantees that all persons are to be treated equally before courts and tribunals. It provides for everyone to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge, or of the rights and obligations of a person in a "suit at law". Broadly speaking, the latter expression refers to various civil (private law) or administrative proceedings before a judicial body.[8] Although article 14 (1) as a whole does not operate in the context of certain types of proceedings, such as extradition, expulsion or deportation procedures, the first sentence of article 14 is applicable whenever domestic law entrusts a judicial body with a judicial task and requires that any such proceedings conform to basic principles of fair trial.[9] In certain issues article 13 of the Covenant incorporates the notions of due process

[5] The press statement is available at http://www.unhchr.ch/huricane/huricane.nsf/view01/57DBD56D289BCDCEC1257440004402FB?opendocument.

[6] CCPR/C/GC/32 (2007), General Comment No. 32.

[7] The Special Rapporteur is grateful for the assistance and cooperation of Dr. Alex Conte, consultant on security and human rights, Mathias Vermeulen, LLM and the International Commission of Jurists in the preparation of the present report.

[8] Human Rights Committee, General Comment No. 32, para. 16.

[9] Ibid., para. 7.

reflected in article 14.[10] In the context of extradition and deportation proceedings the prohibition against *refoulement* may apply not only where there is a risk of torture or other cruel, inhuman or degrading treatment,[11] and in many situations where the death penalty is sought, but also to cases involving a risk of exposure to a manifestly unfair trial.[12] The remaining provisions of article 14 (paras. 2 to 7) set out certain rights and guarantees applicable to the determination of criminal charges, including the right to a defence, the presumption of innocence, and the right to have one's conviction or sentence reviewed by a higher tribunal.

9. Various elements of the right to a fair trial, as codified in article 14 of the Covenant, are also to be found within customary law norms and other international treaties, including treaties pertaining to international humanitarian law or to countering terrorism. In similar terms to article 14, the right to a fair trial is guaranteed by article 6 of the European Convention on Human Rights, article 8 of the American Convention on Human Rights and, in somewhat lesser detail, article 7 of the African Charter on Human and Peoples' Rights and article 13 of the Revised Arab Charter on Human Rights. The Rome Statute of the International Criminal Court also includes the basic requirements for a fair trial in the context of international criminal law.[13] Equally, common article 3(1)(d) of the Geneva Conventions of 1949 on international humanitarian law prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Similar minimal guarantees that are considered to reflect customary international law[14] are to be found in article 75(4) of Additional Protocol I (relating to international armed conflicts) and article 6(2) of Additional Protocol II (relating to non-international armed conflicts). Fair trial guarantees under human rights treaties continue to apply during armed conflict, subject to the rare instances where a State permissibly derogates from the fair trial clauses in the human rights treaties in question.[15]

10. Furthermore, provisions within many universal terrorism-related conventions also require compliance with the right to a fair trial and the rule of law. In the context of the International Convention for the Suppression of the Financing of

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[10] Ibid., para. 62; *Ahani v. Canada*, Communication No. 1051/2002, CCPR/C/80/D/1051/2002 (2004), para. 10.9.

[11] *C v. Australia*, Communication No. 832/1998, CCPR/C/72/D/832/1998 (2001), and *Ahani v. Canada*, Communication No. 1051/2002, CCPR/C/80/D/1051/2002 (2004).

[12] *A R J v. Australia*, Communication No. 692/1996, CCPR/C/60/D/692/1996 (1997), para. 6.15; see OHCHR, *Fact Sheet 32. Human Rights, Terrorism, and Counter-Terrorism*, p. 34; International Commission of Jurists, Legal Commentary to the ICJ Berlin Declaration. Geneva, 2008, p. 97.

[13] Article 67(1) of the Rome Statute identifies as basic requirements: the presumption of innocence; privilege against self-incrimination; the right to communicate with legal representatives freely and in confidence; the right to remain silent without such silence being a consideration in the determination of innocence or guilt; the right not to make an unsworn oral or written statement in one's own defence; and the right not to have imposed upon the accused any reversal of the burden of proof or onus of rebuttal.

[14] Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 (Doc. 5 rev. 1 corr) 22 October 2002, paras. 257-259.

[15] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion* (2004), ICJ Reports 2004, p. 178, 136, para. 106, as to the continued application of international human rights law, including under international conventions, during armed conflict.

Terrorism, for example, article 17 requires the fair treatment of any person taken into custody, including enjoyment of all rights and guarantees under applicable international human rights law, and article 21 sets out a "catch-all" provision making it clear that the Convention does not affect the enjoyment of other rights, obligations and responsibilities of States parties.

11. Because the right to a fair trial is recognized not only in human rights treaties but also within international humanitarian law, international criminal law, counter-terrorism conventions and customary international law, a fair trial cannot be denied through the excuse that human rights treaties or some of them would represent a special category of territorial treaties, not applicable when a State acts outside its own borders.

B. The non-derogable and fundamental nature of fair trial rights

12. Despite its absence from the list of non-derogable rights in article 4(2) of the International Covenant on Civil and Political Rights, the Human Rights Committee has treated the right to a fair trial as one which may not be subject to derogation where this would circumvent the protection of non-derogable rights.[16] Even in situations when derogation from article 14 is permissible, the principles of legality and the rule of law require that the fundamental requirements of fair trial must be respected. This means that: only a court of law may try and convict a person for a criminal offence; the presumption of innocence must always be respected; and the right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by any derogation from the Covenant.[17] In the context of fair trial rights under international humanitarian law, it should be remembered that there can be no derogation from the relevant provisions of the Geneva Conventions or their Additional Protocols. Indeed, denial of the right to a fair trial can amount to a war crime in certain circumstances.

IV. The judiciary

A. Effective access to court

13. The Special Rapporteur has noted a growing number of complaints that legislation introduced to combat terrorism, or legislation on national security or asylum,[18] restricts rights by precluding or limiting recourse to an independent judiciary and accords broad powers to the executive.[19] Typically, such laws suspend *habeas corpus* or *amparo*, and establish an internal review or appeal mechanism devoid of any judicial involvement. In this regard, the Special Rapporteur is equally

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[16] See Human Rights Committee, General Comment No. 32, paras. 6 and 59. See General Comment No. 29, *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11 (2001), paras. 7 and 15. The Revised Arab Charter of Human Rights, in force since March 15, 2008, even treats the right to fair trial (art. 16) as a non-derogable right in times of emergency (article 4.2).

[17] See Human Rights Committee, General Comment No. 29, para. 16.

[18] On detention of terrorism suspects under States' immigration legislation and the need for judicial review, see A/62/263, chap. III. para. 81.B.

[19] See, also, report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/4/25, para. 32.

concerned about the frequent abuse of immunity[20] or indemnity clauses[21] in counter-terrorism laws and in the broad invoking of national security concerns as a blanket bar to access to justice.

14. Article 14 of the International Covenant on Civil and Political Rights encompasses the right of access to court in the determination of both criminal charges and rights and obligations in a suit at law, for the purpose of ensuring that no individual is deprived of his or her right to claim justice. The right of access to courts and tribunals is not limited to citizens of the State, but must be available to all individuals, regardless of nationality or statelessness, or whatever their status (whether asylum seekers, refugees, or other persons who may find themselves in the territory or subject to the jurisdiction of a State).[22] The right under article 14(3)(c) of the Covenant to be tried without undue delay in the determination of any criminal charge means, in practical terms, that a person must be brought before the courts without delay and that criminal proceedings, including any appeal arising from them, must be disposed of promptly. What constitutes "reasonable time" is a matter of assessment in each particular case, taking into account factors such as the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.

15. It should be remembered that article 14(5) of the Covenant guarantees the right to one's conviction and sentence to be reviewed by a higher tribunal without delay, which is not limited to matters of law but also a review of facts.[23] Effective access to appeal rights includes the need to provide reasoned decisions, which is particularly important since it is often through access to independent review and appeal mechanisms that the right to an effective remedy is facilitated.[24] Equally, when a trial *in absentia* has taken place, there must be an opportunity for a fresh determination of the merits of the case in the presence of the accused once the accused has found out about the proceedings.[25]

16. A specific issue of concern for the Special Rapporteur regarding access to justice is the practice of listing and de-listing individuals and groups as terrorist or associated entities, whether by the Security Council through its Al-Qaida and Taliban Sanctions Committee, by the European Union, or by national procedures. This practice has had a serious impact on due process related rights for individuals suspected of terrorism, as well as their families.[26] Because the indefinite freezing of the assets of those listed currently operates without a right to be de-listed, this amounts to a criminal punishment due to the severity of the sanction. As long as

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[20] See, for example, India, Armed Forces Special Powers Act, 1958, para. 6; Sri Lanka, Prevention of Terrorism Act, para. 15, Russian Federation, Federal Law n.35-Z, article 22.

[21] See Sri Lanka, Indemnity (Amendment) Act 1988, para. 2; Pakistan, Anti-Terrorism Act 1997, para. 39.

[22] See Human Rights Committee, General Comment No. 32, para. 9.

[23] See the repeated jurisprudence of the Human Rights Committee on this point including, in *Fernández v. Czech Republic*, Communication No. 1104/2002, CCPR/C/83/D/1104/2002 (2005), para. 7.

[24] See *Singh v. Canada*, Communication No. 761/1997, CCPR/C/60/D/761/1997 (1997), para. 4.2. See also *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Communication No. 48/90, 50/91, 52/91, 89/93 (1999), eighth annual activity report 1994/1995, para. 37.

[25] See *Colozza v. Italy*, (1985) 7 EHRR 516, para. 29.

[26] See A/HRC/17/6/Add.2, paras. 33-36.

there is no independent review of listings at the United Nations level, there must be access to domestic judicial review of any implementing measure.[27] Even where listing does not result in the indefinite freezing of assets, but holds other consequences which might fall short of a criminal punishment, it should be noted that access to courts and a fair trial may also arise from the general provisions of article 14(1), as applicable to a suit at law. At a minimum, the standards required to ensure a fair hearing must include the right of an individual to be informed of the measures taken and to know the case against him or her as soon as possible, and to the extent possible, without thwarting the purpose of the sanctions regimes; the right to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy.[28] The Special Rapporteur has raised similar concerns pertaining to Turkey's classification of organizations linked to terrorist crimes and the need, in that regard, to ensure that procedures for designation are transparent and objective, and accompanied by a right to appeal to an independent judicial body.[29]

1. Access to court by those in detention

17. The provisions of article 14(3) interact with the obligation under article 9(3) of the Covenant to promptly bring a detainee before a competent authority. In cases involving serious charges such as homicide or murder (or terrorism as properly defined),[30] and where an accused is denied bail by the court, an accused must be tried in as expeditious a manner as possible,[31] even in bona fide emergency situations where there is a serious terrorist threat.[32] Developments in counter-terrorism law and practice have seen the emergence of regimes under which a person may be detained outside the context of initiated criminal proceedings, including in administrative or preventive detention for security reasons,[33] or investigative detention (detention for the purpose of questioning and investigation prior to the laying of charges). The Special Rapporteur emphasizes the importance of speedy and regular court review of any form of detention, entailing a real possibility of release.

18. Extended periods of police detention (*détention en garde à vue*), without bringing a suspect before a judge, has been a long-standing practice of concern in

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[27] See A/61/267, chap. III; A/HRC/4/26/Add.3, para. 20; and A/HRC/6/17/Add.2, para. 72.

[28] See A/HRC/4/88, paras. 17-22.

[29] See A/HRC/4/26/Add.2, para. 90(e).

[30] See E/CN.4/2006/98, chap. III.

[31] See *del Cid Gómez v. Panama*, Communication No. 473/1991, CCPR/C/54/D/473/1991 (1995), para. 8.5; and *Glenrry Francis et al. v. Trinidad and Tobago*, Communication No. 899/1999, CCPR/C/75/D/899/1999 (2002), para. 5.4.

[32] *Brogan v. UK* (1998) ECHR, Series A, No. 145-B, para. 61.

[33] As permitted, for example, in Sri Lanka, where the Prevention of Terrorism Act allows arrest without a warrant and permits detention for an initial period of 72 hours without the person being produced before the court (sect. 7), and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence (sect. 9). See also CCPR/CO/79/LKA (2003), para. 13.

several countries, for instance in France,[34] Russia,[35] Northern Africa[36] and South-East Asia.[37] The Special Rapporteur is concerned that the absence of an express provision in the law to the maximum period of such detention, could lead to instances of indefinite detention.[38] Equally, the Special Rapporteur is concerned about strict bail provisions, for instance in Australia.[39]

19. Of special concern to the Special Rapporteur is the use of "administrative detention" as a counter-terrorism tool against persons on the sole basis of a broadly formulated element of suspicion that a person forms a 'threat to national security' or similar expressions that lack the level of precision required by the principle of legality. Much of the information concerning the reasons for such detention is often classified, so that the detainee and his or her lawyer have no access to this information and thereby no effective means of contesting the grounds of the detention.[40] This form of administrative detention appears to be at odds with numerous aspects of the right to a fair hearing under article 14 of the Covenant, and of access to an independent and impartial court, especially when there is no possibility for a review of the detention on the basis of substantive grounds.[41]

20. The Special Rapporteur emphasizes that a court must always be empowered to review the merits of the decision to detain and to decide, by reference to legal criteria, whether detention is justified, and, if not, to order release. It is therefore of

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[34] In its concluding observations of July 2008 the Human Rights Committee expressed concern that Act No. 2006/64 of 23 January 2006 permits the initial detention of persons suspected of terrorism for four days, with extensions up to six days, in police custody (*garde à vue*), before they are brought before a judge to be placed under judicial investigation or released without charge, and that terrorism suspects in police custody are guaranteed access to a lawyer only after 72 hours, and access to counsel can be further delayed till the fifth day when custody is extended by a judge. See, CCPR/C/FRA/CO/4 (2008), para. 14.

[35] In the Russian Federation, the Law on Operative-Search Activity, as well as the federal Law No. 18-FZ of 22 April 2004, amending article 99 of the Code of Criminal Procedure, allows the detainment of suspects of "terrorism" for up to 30 days without being charged. See also CAT/C/RUS/CO/4 (2007).

[36] See International Commission of Jurists, Eminent Jurists Conclude Subregional Hearing on Terrorism and Human Rights in the Maghreb, press release dated 7 July 2006.

[37] International Commission of Jurists, International Panel Ends Hearing In South-East Asia, press release dated 6 December 2006.

[38] For instance, in the Philippines, the 2007 Human Security Act allows, in sect. 19, "in the event of an 'actual or imminent terrorist attack', the detention of a terrorist suspect for 'more than three days' if the police obtain the written approval of a court or a 'municipal, city, provincial or regional official'."

[39] A/HRC/4/26/Add.3, para. 34.

[40] In Malaysia, for instance, section 73.1.b of the Internal Security Act allows any police officer to arrest without a warrant and detain for up to 60 days any person in respect of whom he has reason to believe that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof". After 60 days, sect. 8 of the Internal Security Act allows the Minister of Internal Security to extend the detention without trial for two years, without submitting any evidence for review by the courts. There is no possibility for a legal remedy on substantive grounds for detainees held under section 8 of the ISA. Written submission of Suara Rakyat Malaysia (SUARAM) to the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights, July 2006.

[41] The same concerns pertain to the detention of persons under Military Order 1229 and the Incarceration of Unlawful Combatants Law 2002 in Israel. See A/HRC/6/17/Add.4, paras. 23-26.

crucial importance that the court has the power to review the evidence on which the individual is held.[42]

2. Detention and access to court by persons participating in hostilities

21. In the case of privileged combatants apprehended during the course of an international armed conflict, such persons may be detained as prisoners of war until the end of hostilities. Prisoners of war must be released at the end of hostilities, unless suspected, convicted or sentenced of war crimes, in which case the right to a fair trial continues to apply. Furthermore, persons directly participating in hostilities during the course of a non-international armed conflict may arguably be detained for the duration of the hostilities, but can alternatively be treated as criminal suspects for their use of violence. While acknowledging the need to ensure that there is no impunity for those that commit war crimes, the Special Rapporteur emphasizes that the chance of ensuring a fair trial diminishes over time. For this reason, States should determine, without awaiting for the end of hostilities, whether a person will be tried or not and, in the affirmative cases, proceed with the criminal trial.

22. The Special Rapporteur further emphasizes the need for clarity as to the status of any person detained in relation to an international or non-international armed conflict. The persons detained at the US military facility at Guantánamo Bay have, for example, been categorized by the United States of America as "alien unlawful enemy combatants", regardless of the circumstances of their capture. Not only is this term one of convenience without legal consequences, but the Special Rapporteur has noted serious concerns about the overall length of detention of detainees at Guantánamo Bay (for a period of several years without charge), which fundamentally undermines the right of fair trial.[43] He has also expressed serious concerns about the ability of detainees at Guantánamo Bay to seek a judicial determination of their status, and of their continuing detention.[44] Determination of whether a detainee is an "alien unlawful enemy combatant" is undertaken by the Combatant Status Review Tribunal (CSRT) and the Administrative Review Board (ARB), which are both described by the Department of Defense as administrative, rather than judicial, processes. Detainees are not provided with a lawyer during the course of hearings. Even more problematic is the fact that decisions of the Combatant Status Review Tribunal and the Administrative Review Board are subject to limited judicial review only. These restrictions result in non-compliance with

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[42] Under the 2006 Terrorism Act in the United Kingdom, a person may be detained for a period of up to 28 days, or potentially 42 days if the Counter-Terrorism Bill 2008 (UK) is enacted in its current form. A detainee must, under the Act, be brought before a court within 48 hours and may only be subject to periods of detention of seven days at a time. See sects. 23-25 and schedule 8 of the Terrorism Act 2006 (UK). The review by a district judge to examine further detention concerns only whether continued detention is necessary to obtain, preserve or examine relevant evidence, and whether the case is being pursued diligently and expeditiously by the police. The judge does not examine the merits of the case against the suspect. In its concluding observations of July 2008, the Human Rights Committee expressed its concern over both the current and the proposed law, emphasizing that any terrorist suspect arrested should be promptly informed of any charge against him or her and tried within a reasonable time or released. See CCPR/C/GBR/CO/6, para. 15.

[43] A/HRC/6/17/Add.3, para. 12.

[44] As was confirmed by the United States Supreme Court in June 2008 in *Boumediene v. Bush* 553 US (2008), the denial of the right of *habeas corpus* to Guantánamo detainees through the Military Commissions Act of 2006 was unconstitutional.

various provisions of the Covenant.[45] The Special Rapporteur has similarly reminded the United States and other States responsible for the detention of persons in Afghanistan and Iraq that these detainees also have the right to court review of the lawfulness of their detention without delay and, if suspected of a crime, to a fair trial within a reasonable time.[46]

B. Competence, independence and impartiality

23. The right to a fair trial before a competent, independent and impartial court or tribunal involve elements which are in nature both objective (independence) and subjective (competence and impartiality). The requirements of independence and impartiality must be treated as absolute requirements, which are not capable of limitation.[47] Independence calls for the protection of judicial officers from any form of political influence in their decision-making, including any influence which might be affected against their term of office, security, remuneration, or conditions of service.[48] A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal.[49] The requirement of competence calls for the appointment of suitably qualified and experienced persons to act as judicial officers in any hearing.[50]

24. While the Covenant does not prohibit the establishment or use of military or special courts and tribunals, nor the centralization of judicial investigation, prosecution and trial (whereby terrorist cases are exclusively dealt with by one ordinary court),[51] the Special Rapporteur calls for caution in allocating terrorism cases to military, special or specialized courts, as this potentially raises issues under article 14[52] or article 26 of the Covenant. An additional factor speaking against such solutions is that rulings of special or specialized courts may often not be subject to full review of the conviction and sentence, in respect of issues of law and fact, as required by the Covenant in article 14(5).[53]

1. Military courts or tribunals or other special courts

25. In many countries, the cumulative effect of simplified provisions for dismissal of judges sitting in military or special courts, the lack of security of tenure of

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[45] A/HRC/6/17/Add.3, paras. 13 and 14.

[46] A/HRC/6/17/Add.3, para. 18.

[47] See Human Rights Committee, General Comment No. 32, para. 19. See also *Gonzalez del Río v. Peru*, Human Rights Committee Communication No. 263/1987, CCPR/C/46/D/263/1987 (1992), para. 5.2

[48] See Human Rights Committee, General Comment No. 32, para. 19.

[49] Ibid. On the issue of the control or direction of a tribunal by the judiciary, see also *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, CCPR/C/49/D/468/1991 (1993), para. 9.4.

[50] See *Findlay v. United Kingdom* (1997) ECHR 8, para. 75.

[51] The Special Rapporteur will address the jurisdiction of the Spanish Audiencia Nacional in a forthcoming report to the Human Rights Council. Meanwhile, see the Special Rapporteur's press statement of 14 May 2008, highlighting his preliminary findings, http://www.unhchr.ch/huricane/huricane.nsf/view01/57DBD56D289BCDCEC1257440004402FB?opendocument.

[52] See Human Rights Committee, General Comment No. 32, para. 22.

[53] See *Gómez Vázquez v. Spain*, Human Rights Committee Communication No. 701/1996, CCPR/C/69/D/701/1996 (2000).

judges, the fact that often judges are serving (military) officers appointed by the executive, and the broad discretional power of the executive to refer cases to such courts, lead to serious questions concerning the independence and impartiality of such courts, even where instructions are given to members of a court that they are to act independently.

26. The Special Rapporteur is especially concerned about cases where the executive has broad discretionary powers either to refer terrorist suspects to military or special courts,[54] or to review or confirm the decisions of these courts, which gives the executive the ultimate control over the accused and the outcome of the trial.[55] Individuals accused of the same or similar offences should not be treated with different standards of justice at the whim of the executive. In *Kavanagh v. Ireland*, the Human Rights Committee found a violation of article 26 of the Covenant (non-discrimination) because of the discretionary nature of the prosecutor's power to prosecute a case of organized crime before a special criminal court, rather than in a normal trial before a jury.[56]

27. The Special Rapporteur is equally concerned about lower fair trial guarantees that often characterize military and special courts in practice due to prolonged periods of pre-charge and pretrial detention, with inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to appeal and bail.[57] Moreover, the Special Rapporteur is concerned that lower procedural and evidential standards in these courts often encourage systematic resort to extralegal practices such as torture to extract confessions of alleged terrorist suspects. The Special Rapporteur welcomes the fact that several countries, such as Algeria and India, have abolished the practice of trying terrorist suspects at special courts and have transferred jurisdiction over terrorism cases back to ordinary courts.

28. The use of military tribunals should be limited to trials of military personnel for acts committed in the course of military actions,[58] and the trying of any civilians by military should take place only in limited exceptional situations where resort to such trials is necessary and justified by objective and serious reasons such as military occupation of foreign territory where regular civilian courts are unable to

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[54] See sect. 12.2 of Pakistan's Anti-Terrorism Act (1997) and article 179 of the constitution of the Arab Republic of Egypt (2007), article 179. The Special Rapporteur has also made extensive critical comments about the jurisdiction and operation of United States military commissions under the 2006 Military Commissions Act, see A/HRC/6/17/Add.3, chap. III.

[55] In Egypt, military verdicts are subject to review by other military judges and confirmation by the President. Under the Military Commissions Act in the United States, the "Convening Authority", appointed by the Secretary of Defense, reviews and approves charges against persons determined to be alien unlawful enemy combatants, appoints military commission members, and reviews military commissions' verdicts and sentences.

[56] *Kavanagh v. Ireland*, Human Rights Committee Communication No. 819/1998, CCPR/C/71/D/819/1998 (2001).

[57] International Commission of Jurists, Military Jurisdiction and International Law: *Military Courts and gross human rights violations* (vol. 1) Geneva, 2004.

[58] A/HRC/Sub.1/58/30 (2006), para. 46; E/CN.4/2006/58, para. 29.

undertake the trials.[59] The Special Rapporteur reiterates his concern that the possibility exists for civilians to be tried by a military commission at Guantánamo Bay, in the case of persons who might be categorized by the United States as unlawful enemy combatants but who in fact were not directly involved in the conduct of hostilities in an armed conflict.[60]

2. Compensation to victims of terrorism

29. During his mission to Turkey, the Special Rapporteur was encouraged by the creation by Turkey of one of the few models of systematically addressing the issue of compensation to victims of terrorism. While he recommended as an element of best practice the underlying principles of the Act on the Compensation of Losses Resulting from Terrorist Acts and Measures Taken to Fight Against Terror (Compensation Act), he was troubled by some aspects of its implementation. Despite the judicial nature of the tasks performed by the loss assessment commissions established under the Compensation Act, the commissions are composed primarily of government officials. This, combined with inconsistencies in the award of compensation, and in the admissibility of claims, led the Special Rapporteur to conclude that the compensation mechanisms lacked judicial independence and objectivity.[61] Rights of review and appeal to judicial courts are frustrated by delays and thereby discourage recourse to them.[62]

C. Open administration of justice

30. One of the central pillars of a fair trial under article 14 of the International Covenant on Civil and Political Rights is the open administration of justice, important to ensure the transparency of proceedings and thus providing an important safeguard for the interest of the individual and of society at large.[63] While paragraph 1 permits exclusion of the press and public for reasons of national security, this must occur only to the extent strictly necessary and should be accompanied by adequate mechanisms for observation or review to guarantee the fairness of the hearing.[64] The Special Rapporteur has therefore been troubled by reports of prosecution applications for the entirety of certain criminal proceedings to be held in camera.[65] He further recalls that article 14(1) requires that any judgement must be made public, unless the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

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[59] See Human Rights Committee, General Comment No. 32, para. 22. See also *Madani v. Algeria*, Human Rights Committee Communication No. 1172/2003, CCPR/C/89/D/1172/2003 (2007), para. 8.7; *Bee v. Equatorial Guinea*, Human Rights Committee Communications Nos. 1152/2003 and 1190/2003, CCPR/C/85/D/1152 and 1190/2003 (2005), para. 6.3; and *Benhadj v. Algeria*, Human Rights Committee Communication No. 1173/2003, CCPR/C/90/D/1173/2003 (2007), para. 8.8. For jurisprudence of the European Court of Human Rights on this point see *Ocalan v. Turkey* [2005] ECHR 282 (para. 115); and *Incal v. Turkey* [1998] European Court of Human Rights 48, para. 75.

[60] A/HRC/6/17/Add.3, para 30.

[61] A/HRC/4/26/Add.2, paras. 40-54 and 80.

[62] Ibid., para 43.

[63] See Human Rights Committee, General Comment No. 32, para. 67.

[64] A/HRC/Sub.1/58/30 (2006), para. 45.

[65] See, for example, his comments in A/HRC/6/17/Add.2, para. 32.

V. Aspects of a fair hearing

A. Privilege against self-incrimination

31. The privilege against self-incrimination is of relevance to the right to a fair hearing in two contexts. It may be a matter that invokes article 14(3)(g) of the International Covenant on Civil and Political Rights through the conduct of an investigative hearing where a person is compelled to attend and answer questions.[66] The issue also arises where methods violating the provisions of article 7 (torture and any other inhumane treatment) are used in order to compel a person to confess or testify. On the latter point, it has been observed that such methods are often used, with a growing tendency to resort to them in the investigation of terrorist incidents or during counter-terrorism intelligence operations more generally.[67] Where such allegations are made out, the Human Rights Committee has not hesitated to find a violation of article 14(3)(g), *juncto* articles 7 or 10.[68]

32. The Special Rapporteur stresses that the practical implementation of article 14 (3)(g) of the Covenant is dependent on safeguards and procedural rules that ban in law and practice statements made involuntarily. The Special Rapporteur is therefore concerned about the deviation of ordinary criminal procedures that appear to create a coercive framework that facilitates confessions, for instance in Sri Lanka and Pakistan, where confessions of "terrorist suspects" made to senior police officers are allowed as evidence in court.[69] Experiences from the past, for instance in Northern Ireland,[70] have taught that such deviations, especially in combination with prolonged periods of pre-charge detention, have encouraged the use of methods violating the provisions of article 7 (torture and any other inhumane treatment). No statements or confessions or other evidence obtained in violation of article 7 may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except when a statement or confession is used as evidence that torture or other treatment prohibited by the provision has occurred.[71] It is therefore of concern to the Special Rapporteur that, for instance in Algeria, legislation does not explicitly exclude as evidence confessions obtained under torture,[72] and that in trials before military commissions at Guantánamo Bay, testimony obtained through abusive interrogation techniques that were used prior to the Detainee Treatment Act

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[66] See the Australian Security Intelligence Organization Act 1979, referred to in A/HRC/4/26/Add.3, paras. 31-32. See also sect. 83.28 of the Canadian Criminal Code. The provision was subject to a sunset clause and expired after the Canadian House of Commons voted against extending its application in February 2007.

[67] See Human Rights Committee, General Comment No. 32, para. 41; and A/HRC/6/17/Add.3, chap. IV.

[68] See *Burgos v. Uruguay*, Human Rights Committee Communication No. 52/1979, CCPR/C/OP/1, para. 13.

[69] Sri Lanka, Prevention of Terrorism Act No. 14 (1979), para. 16 (c). Pakistan, Anti-Terrorism Act (1997), article 21H.

[70] Written submission of the Committee on the Administration of Justice to the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights, entitled "War on Terror: Lessons from Northern Ireland", 31 January 2008.

[71] See Human Rights Committee, General Comment No. 32, para. 6, and General Comment No. 29, paras. 7 and 15. Again, numerous violations of article 14, *juncto* article 7, have been found by the Committee, including in *Khudayberganov v. Uzbekistan*, Human Rights Committee Communication No. 1140/2002, CCPR/C/90/D/1140/2002 (2007), para. 8.4.

[72] CCPR/C/DZA/CO/3 (2007), para. 19.

of 2005 may be used as evidence if found to be "reliable" and its use "in the interests of justice"[73] and that even though evidence obtained by torture is now categorically inadmissible, evidence obtained by other forms of coercion may, by determination of a military judge, be admitted into evidence.[73]

33. The Special Rapporteur points out that the broader context in which the accused or a witness makes a statement, such as the existence of secret or prolonged arbitrary detention, irrespective of the coerciveness of the actual interrogation, is also of crucial importance to assess the conformity of a statement with article 14 (3)(g).[74]

B. Evidence obtained in breach of human rights or domestic law

34. Some countries maintain a strict distinction between admissible and inadmissible evidence, often related to trial before a jury that determines issues of fact on the basis of the trial judge's instructions on issues of law. In such systems, testimonies or other types of evidence may be excluded from the case by the judge as inadmissible. Other legal systems, typically those based on the civil law tradition, may rely on the theory of free evaluation of evidence, albeit with the exclusion of evidence obtained by torture as the exception. Due to the important role of intelligence in detecting terrorist crimes and the secrecy accompanying methods of intelligence gathering, States may feel tempted to modify their rules concerning the admissibility of evidence presented in terrorism cases. For instance, evidence obtained by warrantless surveillance, possibly in direct contravention of domestic law, may be used in terrorism cases, either on its own or through indirect hearsay testimony. The Special Rapporteur takes the view that, also in respect of evidentiary issues, terrorism must be combated within the framework of the law and that States, and in particular their judicial organs, need to remain vigilant in upholding the position that the use of evidence obtained in breach of human rights or of domestic law renders the trial unfair.[75]

C. Equal treatment and equality of arms

35. The principle of the equality of arms requires the enjoyment of the same procedural rights by all parties unless distinctions are based on law and can be justified on objective and reasonable grounds, and so long as such distinctions do not entail actual disadvantage or other unfairness to one of the parties.[76] The principle is fundamental to safeguarding a fair trial and may engage various particular aspects of article 14, such as access to evidence, participation in the

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[73] A/HRC/6/17/Add.3, para. 27.

[74] See *R v. Joseph Terrence Thomas*, VSCA 165 (18 August 2006).

[75] The European Court of Human Rights, however, has in some cases taken the approach that a violation of the right to privacy (article 8 of the European Convention on Human Rights) through unlawful methods of obtaining evidence can be established separately, without necessarily rendering the trial as a whole as unfair (*Khan v. United Kingdom*, [2000] ECHR 195), whereas the reliance by a court upon evidence obtained in violation of the prohibition against inhuman treatment (article 3 of the European Convention on Human Rights) did render the trial unfair and constituted a violation also of article 6 of the Convention on fair trial (*Jalloh v. Germany*, [2006] ECHR 721).

[76] See Human Rights Committee, General Comment No. 32, para. 13.

hearing, or representation (these matters are discussed further in this report). It should be noted, in this regard, that the right to a fair trial is broader than the sum of the individual guarantees within article 14, and depends on the entire conduct of the trial.[77] Disproportionate aggregation of resources between the prosecution and the defence in terrorism cases is a matter that strikes at the heart of the principle of the equality of arms required in the safeguarding of a fair trial.

D. Disclosure of information

36. Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that an accused must have adequate time and facilities for the preparation of his or her defence, and to communicate with counsel of choosing. Determination of what constitutes adequate time and facilities requires an assessment of each individual case, but this must at least include access to documents and other evidence that an accused requires to prepare the defence case.[78] All materials that the prosecution plans to offer in court against the accused, or that are exculpatory, must be disclosed to the defence.[79] This obligation exists even in the case of classified information which is not provided to prosecution counsel.[80] Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence, such as indications that a confession was not voluntary. In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim.[81] It is therefore important that an accused be provided with information about the circumstances by which all evidence adduced at trial has been obtained so that he or she may know whether to challenge such evidence.[82]

E. Representation

37. The right to representation involves the right to be represented by legal counsel of choice and the right to self-representation. The right to represent oneself is not absolute and the interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused. Any restriction of the wish of accused persons to defend themselves must, however, have an objective and

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[77] See *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 44* (A/44/40) annex X, sect. E: Communication No. 207/1986, *Yves Morael v. France*, para. 9.3.

[78] See Human Rights Committee, General Comment No. 32, para. 34. See also *van Marcke v. Belgium*, Human Rights Committee Communication No. 904/2000, CCPR/C/81/D/904/2000 (2004), para. 8.3.

[79] See the ruling of the Federal Supreme Court of Germany in the case of Motassadeq, whose trial got remanded because the United States had refused to share with the German courts potentially exculpatory evidence. Decision of the Federal Supreme Court of Germany, 3 March 2004, Strafverteitiger (BGH), StV 4/2004.

[80] A/HRC/6/17/Add.3, para. 26.

[81] See Human Rights Committee, General Comment No. 32, paras. 6 and 33; General Comment No. 29, paras. 7 and 15; and *Convention against Torture*, article 15.

[82] A/HRC/6/17/Add.3, para. 28.

sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice.[83]

38. In the context of the fight against terrorism, limitations upon representation by counsel of choice are sometimes being imposed out of fear that legal counsel may be used as a vehicle for the flow of improper information between counsel's client and a terrorist organization. This fear is being addressed by States either excluding or delaying the availability of counsel;[84] requiring consultations between counsel and client to be electronically monitored, or to take place within the sight and hearing of a police officer,[85] or appointing special (chosen by State) counsel in place of the person's counsel of choice.[86] The appointment of such a special legal counsel may also arise where the disclosure of information redacted for security reasons would be insufficient to guarantee a fair trial and allow the person concerned to answer the case.

39. Equally, the Special Rapporteur notes with concern that a number of terrorism laws do not explicitly exempt the lawyer-client relationship from the scope of various criminal offences such as material support to terrorism. Where measures are taken to monitor the conduct of consultations between legal counsel and client, strict procedures must be established to ensure that there can be no deliberate or inadvertent use of information subject to legal professional privilege. Due to the importance of the role of counsel in a fair hearing, and of the chilling effect upon the solicitor-client relationship that could follow the monitoring of conversations, such monitoring should be used rarely and only when exceptional circumstances justify this in a specific case.[87] The decision to prosecute someone for a terrorist crime should never on its own have the consequence of excluding or limiting confidential communication with counsel. If restrictions are justified in a specific case, communication between lawyer and client should be in sight but not in hearing of the authorities.[88]

40. Generally speaking, there must be a reasonable and objective basis for any alterations from the right to choose one's counsel, capable of being challenged by judicial review. Any delay or exclusion of counsel must not be permanent; must not prejudice the ability of the person to answer the case; and, in the case of a person held in custody, must not create a situation where the detained person is effectively held incommunicado or interrogated without the presence of counsel.[89] The Special Rapporteur was concerned, in this regard, by the Criminal Procedures (Non-Resident Detainee Suspected of Security Offence) (Temporary Provision) Law 2006 of Israel which, in combination with accompanying regulations, permits a

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[83] See Human Rights Committee, General Comment No. 32, para. 37, and its corresponding views in *Correia de Matos v. Portugal*, Communication No. 1123/2002, CCPR/C/86/D/1123/2002 (2006), paras. 7.4-7.5.

[84] As permitted under the Terrorism Act 2000 (UK), para. 8 to schedule 8.

[85] Ibid., para. 9.

[86] As permitted in the context of the control orders regime under the Prevention of Terrorism Act 2005 (UK), and provided for under para. 7 of the Schedule thereto.

[87] See *Erdem v. Germany* [2001] ECHR 434, para. 65.

[88] See also, Human Rights Committee, General Comment No. 32, para. 34.

[89] See *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VII, sect. C, Communication No. 176/1984, *Penarrieta et al. v. Bolivia*, para. 16; and *Dimitry Gridin v. Russian Federation*, Communication No. 770/1997, CCPR/C/69/D/770/1997 (2000), para. 8.5.

security suspect to be detained for up to 21 days without access to a lawyer or family visits such that a detainee may be held without contact with the outside world for periods that could amount to weeks at a time.[90]

41. According to the wording of article 14(3)(d) of the Covenant, every person has the right to "defend himself in person or through legal assistance of his own choosing". In situations where counsel is assigned under legal aid, however, the Human Rights Committee has accepted that limitations may be imposed on the right to choice of counsel.[91] The question of special advocates has been addressed by British courts and the European Court of Human Rights on more than one occasion. In *R (Roberts) v. Parole Board*, the House of Lords considered the ability of the Parole Board to appoint special advocates, Lord Carswell taking the view that the compatibility of special advocates with the right to a fair trial is a matter to be assessed in the particular circumstances of each case and that there may be cases where it would not be fair and justifiable to rely on special advocates.[92] In a later case concerning the validity of control orders under the Prevention of Terrorism Act 2005 (UK), Lord Bingham of the House of Lords emphasized that, while the assistance that special advocates can give has been acknowledged,[93] their use must never undermine the ability of an accused or respondent to effectively challenge or rebut the case against him or her.[94] There are real dangers that procedures accompanying the appointment of special advocates (such as the inability to communicate with the client after classified information is provided to the special advocate) frustrate and undermine the ability of a person to instruct counsel for the purpose of answering the case.[95]

F. Standard of proof

42. As an almost universally recognized principle, the standard of proof applicable to criminal proceedings is that of proof beyond a reasonable doubt, and of the balance of probabilities in civil proceedings. Given the nature of certain terrorism-related proceedings which fall short of criminal prosecutions, and despite the serious consequences that may follow such proceedings, the Special Rapporteur urges States to carefully consider the applicable standards of proof and whether a hybrid of the two should be applicable. He expresses concern, for example, over the fact that control orders, under the regimes in the United Kingdom and Australia,

[90] A/HRC/6/17/Add.4, para. 24.

[91] *Teesdale v. Trinidad and Tobago*, Human Rights Committee Communication No. 677/1996, CCPR/C/74/D/677/1996 (2002), para. 9.6.

[92] *R (Roberts) v. Parole Board* [2005] UKHL 45, para. 144.

[93] As in *Chahal v. United Kingdom* (1996) 23 EH RR 413; *Al-Nashif v. Bulgaria* (2002) 36 EHRR 655, para. 97; and *M v. Secretary of State for the Home Department* [2004] 2 All ER 863, para. 34.

[94] *Secretary of State for the Home Department v. MB and AF*, see note 93 above.

[95] As observed by Lord Bingham, ibid., para. 35; and Lord Woolf in *Roberts*, see note 92 above, para. 83 (vii).

may be imposed on a simple balance of probabilities but may nevertheless put significant burdens upon a controlled person, including a deprivation of liberty.[96]

VI. Death penalty cases

43. Article 6 of the International Covenant on Civil and Political Rights prohibits the reintroduction of capital punishment in countries that have abolished it, either generally or in respect of specific crimes such as terrorist crimes.[97] As article 6 of the Covenant is non-derogable in its entirety, any other State which seeks to retain the death penalty for terrorist crimes is obliged to ensure that fair trial rights under article 14 of the Covenant are rigorously guaranteed. Given the measures already noted in this report concerning the trial of terrorism offences and related proceedings, the Special Rapporteur therefore emphasizes that any trial for terrorism offences which could lead to the imposition of the death penalty, as well as all stages before the trial,[98] and the consideration of appeals on matters of fact and law after the trial,[99] must rigorously comply with all aspects of a fair trial. The Special Rapporteur has expressed concern, in this regard, at the ability of military commissions at Guantánamo Bay to determine charges in respect of which the death penalty may be imposed. Given that any appeal rights subsequent to conviction are limited to matters of law, coupled with the various concerns noted by him pertaining to the lack of fair trial guarantees in proceedings before military commissions, the Special Rapporteur has concluded that any imposition of the death penalty as a result of a conviction by a military commission under the Military Commissions Act 2006 is likely to be in violation of article 6 of the Covenant.[100]

VII. Conclusions and elements of best practice

44. The right to a fair trial is a fundamental guarantee in both criminal and civil proceedings. Its principles, contained within international human rights treaties and customary law, are applicable to judicial guarantees under international humanitarian law and to procedural guarantees pertaining to extradition, expulsion or deportation proceedings. The right to a fair trial may not be subject to derogation where this would circumvent the protection of non-derogable rights and, even when derogation is permissible, certain fundamental safeguards may not be abrogated by

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[96] See the Prevention of Terrorism Act 2005 (UK), section 4(7), and the Anti-Terrorism Act (No. 2) 2005 (Australia), section 104.4. On the latter see A/HRC/4/26/Add.3, para. 37. On the question of control orders amounting to a deprivation of liberty, see the House of Lords judgments in *Secretary of State v. JJ and Others* [2007] UKHL 45; *Secretary of State v. MB and AF* [2007] UKHL 46; and *Secretary of State v. E and Another* [2007] UKHL 47.

[97] Removal, by a State which has abolished capital punishment, of a person to a jurisdiction where the death penalty is sought against that person amounts to a violation of article 6 of the International Covenant on Civil and Political Rights: see *Judge v. Canada*, Human Rights Committee Communication No. 829/1998, CCPR/C/78/D/829/1998 (2002).

[98] See *Makhmadim Karimov et al. v. Tajikistan*, Human Rights Committee Communication Nos. 1108 and 1121/2002, CCPR/C/89/D/1108 and 1121/2002 , para. 7.5.

[99] See Human Rights Committee, General Comment No. 32, para. 51. See also *Robinson LaVende v. Trinidad and Tobago*, Human Rights Committee Communication No. 554/1993, CCPR/C/61/D/554/1993 (1997), para 5.8; and *Bondlal Sooklal v. Trinidad and Tobago*, Communication No. 928/2000, CCPR/C/73/D/928/2000 (2001), para. 4.10.

[100] A/HRC/6/17/Add.3, para. 31.

way of derogation. Judicial guarantees under international humanitarian law cannot be subject to derogation.

45. All aspects of counter-terrorism law and practice must be in compliance with international human rights law, including the right to a fair trial. Having regard to emerging practices in the fight against terrorism, the Special Rapporteur emphasizes the following basic principles as elements of best practice in securing the right to a fair trial in terrorism cases:

(a) All persons, regardless of nationality or statelessness, must have access to court in the determination of criminal charges or their obligations in a suit at law. Such access must be without delay and include full review by a higher tribunal of any criminal conviction and sentence. In the case of persons detained in relation to an international or non-international armed conflict, there is a special need for clarity as to the status of any such person, accompanied by the ability to seek a meaningful judicial review of their status and the lawfulness of their deprivation of liberty, entailing the possibility of release. Concerning the listing of terrorist or associated entities, and so long as there is no independent review of listings at the United Nations level, there must be access to domestic judicial review of any implementing measure. A person subject to such measures must be informed of the measures taken and to know the case against him or her, and be able to be heard within a reasonable time by the relevant decision-making body. Those held in detention, including in immigration detention facilities, must have access to a judicial hearing as to the legality of their detention within no longer than 48 hours of being detained. In the case of any period of extended detention occurring outside the context of actual criminal proceedings (such as investigative or preventive detention) the need for continued detention of the person must be regularly reviewed by a judicial authority, which should occur at least every seven days;

(b) The requirements of independence and impartiality of judges or other persons acting in a judicial capacity may not be limited in any context. Judicial officers must be free from any form of political influence in their decision-making. The use of military courts should be resorted to only in respect of military persons for offences of a military nature, and any hearing before such courts must be in full conformity with article 14(1) of the International Covenant on Civil and Political Rights. The use of special or specialized courts in terrorism cases should be avoided. While the involvement of judicial officers in investigative hearings is not in violation of article 14 per se, the judiciary must retain procedural powers to ensure that such hearings are conducted in accordance with the rule of law and without endangering the independence of the judiciary;

(c) The right to a fair hearing includes the open administration of justice. Any exclusion of the press or public on national security grounds must occur only to the extent strictly necessary on a case-by-case basis and should be accompanied by adequate mechanisms for observation or review;

(d) Where any person is compelled to provide information at investigative or intelligence hearings, the privilege against self-incrimination requires that the information obtained at such hearings, or derived solely as a result of leads disclosed, at those hearings must not be used against the person. Law enforcement representatives should not be present during intelligence-gathering hearings and a clear demarcation should exist and be maintained between intelligence gathering and criminal investigations. There may be no circumstances in which the use of

evidence obtained by torture or cruel, inhuman or degrading treatment may be used for the purpose of trying and punishing a person. If there are doubts about the voluntariness of statements by the accused or witnesses, for example, when no information about the circumstances is provided or if the person is arbitrarily or secretly detained, a statement should be excluded irrespective of direct evidence or knowledge of physical abuse. The use of evidence obtained otherwise in breach of human rights or domestic law generally renders the trial as unfair;

(e) As criminal offences, the prosecution of acts of terrorism should be undertaken with the same degree of respect for the established rigours of criminal law applicable to ordinary offences. The principle of the equality of arms furthermore requires the enjoyment of the same procedural rights by all parties unless distinctions are based on law and can be justified on objective and reasonable grounds, and so long as such distinctions do not entail actual disadvantage or other unfairness to one of the parties;

(f) All materials that the prosecution plans to offer in court against the accused, or that are exculpatory, must be subject to disclosure. The protection of national security may justify the redaction of information, so long as compensatory mechanisms are adopted to ensure that this does not prejudice the overall right to a fair hearing and to be aware of, and able to respond to, the case;

(g) Any delay or exclusion of legal representation on security grounds must not be permanent, must not prejudice the ability of the person to answer the case, and, in the case of a person held in custody, must not create a situation where the detained person is effectively held incommunicado. Measures taken to monitor the conduct of consultations between legal counsel and client must be accompanied by strict procedures to ensure that there can be no deliberate or inadvertent passing on of information subject to legal professional privilege;

(h) States should take care in prescribing standards of proof applicable to terrorism-related proceedings which fall short of criminal prosecutions and take into account, in that regard, the nature of consequences flowing from such proceedings;

(i) In countries where terrorist crimes remain subject to the death penalty, the State is obliged to ensure that fair trial rights under article 14 of the Covenant are rigorously guaranteed.